In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-191

THOMAS RAY SANDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 15, 1971, and a petition for rehearing was denied on April 22, 1971 (Pet. App. C). The petition for a writ of certiorari was filed on May 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

429-969—71——1

QUESTIONS PRESENTED

1. Whether the in-court identification of petitioner was tainted by impermissibly suggestive pretrial photographic identification procedures.

2. Whether a second in-court identification was the result of an improper lineup.

3. Whether statements made by petitioner in a post-conspiracy conversation with a codefendant were properly admitted.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count charging that he and three codefendants conspired to cause forged money orders to be transported in interstate commerce, in violation of 18 U.S.C. 371, and one count charging that he individually committed one such substantive offense, in violation of 18 U.S.C. 2314 (Pet. App. 45–51; R. 911).[1] He was sentenced to five years' imprisonment on each count, to run concurrently. The court of appeals affirmed (Pet. App. 1–22).

On October 5, 1968, Joseph Gregory, Elmo Midyette, and Richard Seader stole 180 American Express Company money order forms and a money order machine in a burglary of a Seven-Eleven store in Homestead, Florida. Gregory and Seader were indicted along with petitioner; Gregory pleaded guilty before trial and testified for the government, and Seader was convicted with petitioner.[2] Midyette was a government witness at the trial. (Pet. App. 5; R. 115, 438.)

[1] "R." refers to the trial transcript in two consecutively paginated volumes, a copy of which is being lodged herewith.

[2] Seader's conviction was also affirmed by the court of appeals, and he has not petitioned for a writ of certiorari.

Following the theft, the three "printed up" some of the money order forms and then abandoned the remainder and the machine. On the following day, Gregory, Seader, and another government witness, Minda Shiland, drove to petitioner's house in West Palm Beach, Florida. On the way Seader stated that he intended to arrange a sale of the money order machine to petitioner. Petitioner met with them and agreed to give Gregory and Seader false identification papers in exchange for the money order machine and some of the money order forms. Gregory and Seader promptly retrieved the money order machine and the money order forms. Again accompanied by Mrs. Shiland, they returned to petitioner's house, where Seader delivered the machine and the order forms to petitioner. (Pet. App. 4–5; R. 31–32, 34, 37–41, 54, 116–119, 440–442, 527–528, 652–653.)

Gregory, Seader, and Mrs. Shiland returned to petitioner's house on two other days later the same week. During these visits Gregory and Seader received from petitioner their false identification papers, consisting *inter alia* of Florida driver's licenses, typed by petitioner, in the names of persons picked from the telephone book. Gregory's license purported to have been issued to one Clifton Carlin. Gregory told petitioner that he was a musician for purposes of completing the license form. The fictitious licenses were used by Gregory and Seader in cashing a large number of the money orders which subsequently entered the channels of interstate commerce (Pet. App. 5; R. 41–42, 57–58, 94, 260, 331–332, 371–372, 442–446, 463–465, 519).

A third codefendant, Sandra Neal, also pleaded guilty prior to trial. She had been living with petitioner during the period involved. Using a fictitious Florida driver's license for identification purposes, she passed several of the stolen money orders, including one which she gave as deposit on a rental car. Miss Neal, who admitted passing the money order, was driven to the rental agency by a male companion in a blue Corvair convertible owned by petitioner. Donald Hill, the proprietor of the agency, identified petitioner as Miss Neal's companion. (Pet. App. 9, 11, 22; R. 408–415, 726–728.)

The money order that petitioner was charged with passing bore the name Clifton Carlin as payee and was cashed on October 8, 1968, at a branch office of a West Palm Beach savings and loan association. Mrs. Carroll Chesser, the teller who cashed the money order, identified petitioner as the person who presented it. She stated that petitioner presented a Florida driver's license issued in Carlin's name for identification and told her that he was playing in a band in Miami (Pet. App. 6; R. 259, 263).

ARGUMENT

1. Relying on *Simmons* v. *United States*, 390 U.S. 377, petitioner contends that Mrs. Chesser's in-court identification of him was improperly admitted because it was tainted by suggestive pre-trial photographic identification procedures (Pet. 7–9). In *Simmons*, the Court concluded that photographic identification there was not improper. It admonished that "each case must be considered on its own facts" and stated

that an in-court identification should be set aside "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (390 U.S. at 384). The court of appeals carefully considered petitioner's contention (Pet. App. 6–8, 18–20) and concluded that Mrs. Chesser's identification "was well within the guidelines laid down by *Simmons*" (Pet. App. 18). We believe that conclusion was correct and that there is no occasion for further review of this essentially factual question.

Mrs. Chesser initially identified petitioner through a "mug shot" taken three days previously (Pet. 5–6; R. 231–235). She had already identified a photograph of petitioner—tentatively—before she saw that picture (Pet. App. 19).[3] At trial, she was positive that it was petitioner who had presented the money order (R. 198–199) and testified that she had seen him entering the courtroom on the preceding day without his being pointed out to her (R. 201). She adhered to her identi-

[3] The initial identification occurred on October 24, 1968, two weeks after the money order was cashed. Detective Wonderle of the West Palm Beach Police Department was examined out of the presence of the jury and testified that he presented a group of six photographs to Mrs. Chesser, including two of petitioner—the mug shot and an ordinary photograph taken in 1965. Mrs. Chesser examined the photographs one by one. When she came to the third picture, the 1965 photograph, she "made a tentative identification, saying that it looked like the man but she was not sure." When she viewed the sixth photograph, the mug shot, she made a positive identification (R. 233–235). Wonderle testified that he also showed Mrs. Chesser a picture of Gregory (R. 236), who petitioner contends cashed the money order (Pet. 9), although it is not clear whether that picture was in the group of six photographs.

fication after Gregory (who petitioner claimed cashed the money order) was brought into the courtroom to test her recollection (R. 209–210). Gregory acknowledged that he passed one of the money orders at another financial institution in West Palm Beach, but denied that he cashed this one (R. 444–445). In these circumstances, we believe that while here, as in *Simmons*, the pre-trial identification procedures followed may have "fallen short of the ideal" (390 U.S. at 386), the trial court did not abuse its discretion in permitting Mrs. Chesser's in-court identification.[4]

2. Nor is there merit to petitioner's contention that witness Hill's in-court identification of him as the male companion of Miss Neal when she cashed one of the money orders at Hill's rental agency was erroneously allowed because Hill had made a pre-trial identification of him under circumstances which "amount[ed] to an improper lineup" (Pet. 9–12). The court of appeals also carefully considered this contention (Pet. App. 10–17, 20–22) and found that the pre-trial identification was not made at a "lineup" (Pet. App. 21). It occurred when Hill was taken to the county jail to identify Miss Neal. Petitioner was

[4] Moreover, Mrs. Chesser's testimony was critical only to petitioner's guilt on Count Two. Since the sentence on that count runs concurrently with the sentence on the conspiracy count, the Court could properly disregard petitioner's contentions on the issue as a matter of "judicial convenience." Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *McGee* v. *United States*, No. 362, this Term, decided May 17, 1971, slip op., p. 12, n. 5. This transaction was only one of five overt acts alleged in the conspiracy count (Pet. App. 47). Petitioner's guilt of the conspiracy charge did not depend on Mrs. Chesser's identification and rested on adequate and substantial evidence apart from her testimony.

at the booking desk for another offense, and Hill recognized him (Pet. App. 10, 21). As the court below noted: "The police had no intention of exhibiting Sandell at all. They did not have him there for identification. * * * The better view of this situation is that Hill spontaneously recognized Sandell when he unexpectedly encountered him, even though the encounter was at a booking desk, where Hill had no prior idea that he would see him" (Pet. App. 21). *United States* v. *Wade*, 388 U.S. 218, on which petitioner relies, has no application to these circumstances.

Moreover, Miss Neal admitted passing the fraudulent money order and Hill's identification dealt only with whether it was petitioner who had driven her to the place of business. The proof from other witnesses showed, and petitioner admitted, that he was living with Miss Neal at the time and had been for several months in the same house where the other witnesses said the stolen money order machine and money orders had been delivered to him. Hill's identification, therefore, was not prejudicial to petitioner's case: "One automobile trip, contrasted with three months of living together, can hardly be elevated to the status of prejudicial error" (Pet. App. 22).

3. Petitioner's contention that a post-conspiracy conversation between him and Gregory was improperly admitted in evidence (Pet. 12–13) is insubstantial. The conversation occurred during a jailhouse visit with Gregory about a month prior to trial and concerned who the likely government witnesses would be. Gregory testified that petitioner told

him Mrs. Shiland "didn't really see too much at the house," but nonetheless it would be better if she did not testify, and that if she did not petitioner would probably go free (R. 454, 460–462). These statements were purportedly made by petitioner himself, and were admissible as evidencing consciousness of guilt. Thus, the fact that they occurred after the conspiracy had terminated is immaterial. Cf. *Rich* v. *United States*, 384 F. 2d 887, 888 (C.A. 5).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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